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Supreme Court, U.S.
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No. 97-492

In The

Supreme Court of the United States

October Term, 1997

JOHN F. VICKERS MASONRY, an Arizona corporation,

Petitioner,

vs.

GIUSEPPE FURRER, S.P.A., an Italian corporation,

Respondent.

On Petition for a Writ of Certiorari to the State Supreme Court of Arizona

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner disagrees with the characterization of the case set forth in Respondent's Statement of the Case. Primarily, Respondent has misstated the evidence in arguing that only minor instances of Respondent's nonperformance predated the Settlement Agreement of February 2, 1990. In fact, Respondent's serious production errors lead to material discrepancies which caused Petitioner to incur extra labor requirements and damages in excess of $45,000. Further, and most importantly, Respondent erroneously states that at the time the Settlement Agreement was made by the parties, there was no knowledge of the remaining materials Respondent was to supply to finish the project. The trial evidence proved the Settlement Agreement included Respondent's furnishing all materials required under the contract. Both Petitioner and Respondent knew that each party was waiving its claims against the other just as the trial judge and the Arizona Court of Appeals found. The Arizona Court of Appeals stated:

> Although the parties presented conflicting and confusing testimony regarding their understanding of which issues the agreement resolved, the trial judge is better able than are we to resolve the contradictions. The record provides ample support for the trials court's finding, and we defer to the trial court on this factual question.

(Petition, App. B).

Respondent initiated its suit against Petitioner on the theory of fixed-price contract alleging that Petitioner had not paid pursuant to the contract. Only when Respondent faced dismissal of the claims on summary judgment did Respondent allege open account recovery.

REASONS FOR GRANTING THE WRIT

I.

THE ARIZONA SUPREME COURT'S DECISION DENIED PETITIONER PROCEDURAL DUE PROCESS BECAUSE THE DECISION IGNORED APPLICABLE TRADITIONAL STANDARDS OF REVIEW WHICH REQUIRE DEFERENCE TO THE TRIAL COURT'S FACTUAL DETERMINATIONS ON CONFLICTING EVIDENCE.

Contrary to Respondent's position, this is not simply a case of legal error by the trial court on stipulated fact. The Arizona Supreme Court substituted its judgment for that of the trial judge who made his findings based on conflicting evidence. The Arizona Court of Appeals first reviewed the trial judge's findings and conclusions and properly affirmed the findings and conclusions applying Arizona's appellate standards of review. Then, the Arizona Supreme Court's error, and the denial of Petitioner's procedural due process, occurred when that court totally ignored Arizona's appellate standards of review, weighed the incorrect summary of the evidence presented in Respondent's Petition For Review and then came to its own factual conclusions without even the benefit of oral argument.

A. Respondent Has Distorted The Facts Concerning The Trial Evidence On The Parties' Alleged Agreement To Unit Prices And Bid Prices, Mischaracterizing Material Contract Terms And Respondent's Contract Performance.

Petitioner disagrees with Respondent's statements that unit prices were acknowledged at trial and that unit prices were standard industry prices used in the original bid. The original bid of Respondent contained *no* unit prices. Petitioner had no reason to know what unit prices Respondent used in calculating the bid. Such unit prices were irrelevant to Petitioner who had received a lumpsum bid from Respondent.

The record at trial was teeming with testimony and factual disputes about whether Respondent satisfied the contract requirements to furnish specifically fabricated stone materials. Petitioner did not change the contract requirements by 54%. Miscuts during fabrication were not minor as Respondent alleged, but rather commonplace. Significant quantities of nonconforming materials were supplied untimely by Respondent. Evidence supported the trial judge's finding that Petitioner received materials barely sufficient to complete the contract. (Petition, App. C, Finding #25).

The Arizona Supreme Court — for whatever reason — substituted its findings for those made by the trial court who was better suited to weigh the conflicting evidence. Disregarding the standards of review deprived Petitioner of procedural due process. *Board of Regents v. Phoenix Newspapers,* 167 Ariz. 154, 806 P.2d 348 (Ariz. 1991).

B. The Arizona Supreme Court Disregarded The Standards Of Review And The Parties' Decisions Regarding The Scope Of The Settlement Agreement.

Oddly enough, the Arizona Supreme Court delved into a determination of whether it thought the Settlement Agreement was a good deal for Respondent. In the process, the court disregarded the standards of review which mandate deference to the trial court in findings based on disputed evidence. The court was lead into this determination because Respondent erroneously stated that both parties were unaware of the materials yet to be furnished to complete the project under the lumpsum contract. This determination ignores the Settlement Agreement actually made by Petitioner and Respondent as stone experts. Each party knew from the construction drawings the amount of stone furnished and remaining to be furnished as of February 2, 1990, the date of the Settlement Agreement. Furthermore, Petitioner had already discussed with Respondent the need for additional materials to complete the project and the multitude of Respondent's production errors as of that date.

The Arizona Supreme Court seriously erred in finding that the parities did not consider the materials needed to finish the project when entering into the Settlement Agreement.

Respondent did not waive over $107,000 for materials to be supplied following settlement, as Respondent states. Neither did Petitioner waive only $10,000 in chargebacks. Respondent and the Arizona Supreme Court have ignored all of the offsets for production errors, miscuts, and quantity deficiencies which Petitioner experienced because of Respondent's contract breaches. The evidence was conflicting on the extent of the offsets for production deficiencies which the trial judge evaluated. The trial evidence supported the trial court's findings as affirmed by the Arizona Court of Appeals that these parties understood the status of contract performance and that each was waiving all claims against the other relating to contract completion. Therefore, the Arizona Supreme Court had no legal justification to overturn the decisions of the trial court and the Arizona Court of Appeals both of which followed Arizona law.

II.

THE DENIAL OF PETITIONER'S PROCEDURAL DUE PROCESS RIGHTS BY THE ARIZONA SUPREME COURT PROVIDES A BASIS FOR REVIEW UPON CERTIORARI.

This case involves principles the settlement of which are of vital interest to the public and the parties. If the Arizona Supreme Court is allowed to ignore its traditional standards of review without rehearing, similar litigants will face denial of their procedural due process rights as well. The Arizona Supreme Court is not a court of first impression and should not act as such. This case presents a substantial issue that warrants this Court's attention.

Respondent has properly recognized that the Arizona Supreme Court has the prerogative of reviewing lower court findings for

error. The Arizona Supreme Court is not empowered, however, to pick and chose between the facts presented to effectively rewrite the parties' settlement agreement. The exercise of such authority is not fair and impartial and results in the denial of due process.

Petitioner has timely raised the issues which are the subject of this Petition for Writ of Certiorari. Because the violation of Petitioner's procedural due process rights occurred with the Arizona Supreme Court's decision of February 13, 1996, with that court denying Petitioner's Motion for Reconsideration, the issues could not have been raised any sooner than when raised in this Petition.

CONCLUSION

Limited standards of appellate review recognize that trial judges are in the best position to weigh credibility and resolve factual disputes. Without clearly violating litigants' procedural due process rights, appellate courts cannot substitute their factual determinations for those made at trial upon conflicting evidence. Granting this Petition will allow this Court to preserve procedural due process rights by mandating that appellate courts remain appellate courts. The Petition should be granted.

Respectfully submitted,

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